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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-550

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*

PETITION FOR REHEARING

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PETITION FOR REHEARING

Carolyn Bradley, et al., petitioners in No. 72-550, respectfully pray the Court to grant rehearing in this cause, and in support thereof state as follows:

1. On May 21, 1973, four weeks after this case was argued, this Court affirmed the judgment of the Fourth Circuit by an equally divided vote. The practice of thus affirming decisions as to which the Court is evenly divided is of long standing, dating at least from *The Antelope*, 23 U.S. 66, 126-127 (1825). The cases resolved in this unusual manner have been few in number, rarely more than one or two a year when there was no vacancy on the court.[1] Although the subject matter involved in these cases

[1] There have been eleven such cases in the last five terms. *Bradley* v. *State Board of Education*, 41 U.S.L.W. 4685; *United States* v *First National Bancorporation*, 41 U.S.L.W. 4358 (1973); *United States* v. *Chas. Pfizer & Co. Inc.*, 404 U.S. 548 (1972); *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971); *Radich* v. *New York*, 401 U.S. 531 (1971); *Grove Press* v. *Maryland State Board of Censors*, 401 U.S. 480 (1971); *Decker* v. *Harper & Row*

has varied widely, certain common characteristics can be discerned.

First, these cases have generally presented a clearcut choice between two and only two alternative legal positions, with no middle ground for which a majority might be mustered. Thus in *Alitalia-Linee Aeree Italian* v. *Lisi* the Court divided over whether a printed warning on a baggage check constituted adequate notice of the limits on airline liability set by the Warsaw Convention. 390 U.S. 455; see 370 F.2d 508 (2nd Cir. 1966).

Second, a similarly clearcut dichotomy as to the relief to be granted or withheld has usually existed. In *Biggers* v. *Tennessee*, for example, the Court was forced to choose between affirming the petitioner's conviction and ordering a new trial. 390 U.S. 404.

Third, the affirmance invariably brought the particular litigation involved to an end, except where further relief was available in a subsequent habeas corpus action.

And the cases which the Court has permitted to be resolved in this way have generally involved legal questions of extremely limited applicability, *Decker* v. *Harper and Row Publishers*, 400 U.S. 348 (1971), or the sufficiency of evidence upon which a lower court decision was founded. *Anderson* v. *Johnson*, 390 U.S. 456 (1968).

Until now, the practice of this Court has been to abandon effort to overcome an even division only if the impasse would be particularly difficult to break, the affirmance

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Publishers, 400 U.S. 348 (1971); *Atlantic City Electric Co.* v. *United States*, 400 U.S. 73 (1970); *In the Matter of Spencer*, 397 U.S. 817 (1970); *Standard Industries, Inc.* v. *Tigret Industries, Inc.*, 397 U.S. 586 (1970); *Du Vernay* v. *United States*, 394 U.S. 309 (1969).

finally resolves the dispute between the litigants, and the result does not leave lower courts hearing similar litigation hopelessly without guidance. The Court's resolution of the instant case, however, partakes of none of these characteristics.

2. This case is not one which requires the Court to choose between two and only two legal theories whose rationales and practical consequences are drastically different. The Court is offered a broad spectrum of positions to choose among in deciding the central problem at issue —when district courts have the power to cross school district lines to carry out the commands of *Brown*. The District Court and the Court of Appeals are, to be sure, at opposite ends of the spectrum, but this Court could properly adopt some intermediate position.

The wide variety of factors which the parties have advanced and bearing on the propriety of the relief awarded by the District Court are too numerous to recite in full. At least six major and distinct general theories have been offered as to the circumstances under which district courts have the power to cross district lines:

(a) Never, because of the Tenth Amendment.

(b) When the district lines were created or maintained with the purpose of discriminating on the basis of race.

(c) When different proportions of black and white children on either side of the line are the result of discriminatory state action in housing, zoning, school construction, etc.

(d) When one or all of the school districts involved are operating a dual system, and metropolitan

relief is necessary to avoid perpetuating that system, e.g., because of white flight.

(e) When the school district lines have been crossed with official sanction for other purposes, especially if the purposes included maintaining segregation.

(f) When there are substantially different proportions of black and white children in various districts, all of which are part of a single metropolitan area.

Petitioners submit it is unlikely that, upon rehearing, the Court would be equally divided on all or even most of these standards. If, as is of course possible, the Court can agree as to the circumstances under which district lines may be crossed, but is evenly divided as to whether those circumstances are present in this case, two alternatives would remain, both preferable to the instant impasse: The Court could remand to the District Court for further hearings, on the ground that the parties had not fully developed the relevant evidence or that the District Court had not made adequate findings. *Dyson* v. *Stein*, 401 U.S. 200, 203 (1971); *Byrne* v. *Karalexis*, 401 U.S. 216, 220 (1971). Or, as was done in *The Antelope*, 23 U.S. 66, 126-27 (1825), the Court could confirm this judgment by an equal division, but articulate for the guidance of future litigation in this and other cases the circumstances under which school district lines might be disregarded.

3. Nor is this a case in which the Court must simply choose between the merger relief ordered by the District Court and the erection of an impenetrable barrier to black children at the city line.

Merger of the three school districts is, to be sure, the method preferred by the Richmond School Board to finally

dismantle the dual school system in Richmond and the surrounding counties. But other possible solutions, with differing practical effects and effectiveness, are available for consideration. The three school boards might be permitted to operate their own school systems, but be directed to exchange a fixed number of students from specified schools. The boards could be required to permit and encourage majority to minority transfers across district lines. White parents who seek to flee the unitary system in Richmond by moving to the suburbs might be required to continue to send their children to the city schools for a specified period of time. Or students living near the boundary line between city and county might be directed to attend the nearest school regardless of whether they had to cross that boundary en route. Merger of the school districts is not itself a single alternative; the terms and conditions of the merger ordered by the District Court in this case might themselves be modified in any one of numerous respects.

It is difficult to believe that, after further deliberation, at least one remedy could not be found, among these or others devised by the Court, on which five members of the Court could concur. Nor is it even necessary that a majority agree that a particular form of relief is required in this case; the Court could rule which remedies were and were not permissible, and remand to the District Court to decide on the best of the available alternatives.

4. Review by writ of certiorari was sought in this case and in No. 72-549 because the decision below is in conflict with decisions of this and lower courts, and because of the need for guidance from this Court in a large number of pending metropolitan desegregation cases. Petition for Writ of Certiorari in No. 72-550, pp. 64-88; Petition for Writ of Certiorari in No. 72-549, pp. 38-40 and 48-52. The

same factors which prompted the Court to grant the writs require that the Court make every effort to answer the questions raised by this case.

Litigation seeking desegregation across district lines such as that at issue in this case is now pending in numerous cities. Petition for Writ of Certiorari in No. 72-550, pp. 64-66. The plethora of unanswered questions which must now be confronted in these cases is plainly indicated by the plethora of theories and remedies noted above. Only this Court, as the ultimate expositor of how the commands of *Brown* are to be met, can bring clarity and uniformity into this confused but terribly important area. Three years ago the Chief Justice recognized the need for guidance on this subject when he wrote "[a]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including . . . to what extent school districts and zones may or must be altered as a constitutional matter. . . ." *Northcross* v. *Board of Education*, 397 U.S. 232, 237 (1970) (concurring opinion).

In the past this Court has restricted affirmances by equally divided votes to cases which did *not* involve questions of great public impact necessarily affecting much pending litigation. A prompt resolution of the questions posed by the Chief Justice in *Northcross* and appropriately presented here is vital to the education of countless black children. Those questions should be resolved in this case.

The decision of the Fourth Circuit appears to hold that school district lines may only be altered or crossed if those lines were established or maintained to perpetuate segregation. This position accords fully with that taken earlier by the Fourth Circuit in *United States* v. *Scotland Neck City Board of Education*, 442 F.2d 575 (1971) and *Wright* v. *Council of the City of Emporia*, 442 F.2d 570 (1971).

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However, two weeks *after* the Fourth Circuit's decision in the instant case, both *Scotland Neck* and *Emporia* were reversed by this Court, all of whose members agreed that the purpose of the district lines was irrelevant if they had the effect of impeding the dismantling of a dual system. 33 L.ed. 2d 51 and 75.

Prior to this case it had been thought clear that state action denies the equal protection of the laws whenever, regardless of its purpose, it has the effect of disabling blacks in the full enjoyment of their rights as American citizens. This unresolved conflict between the Fourth Circuit's and this Court's opinions, fraught as it is with tremendous consequences for all litigation under the Fourteenth Amendment, can be resolved only by this Court.

Two days prior to the filing of this Petition, the Sixth Circuit issued an opinion regarding inter-district relief in *Bradley* v. *Milliken* (No. 72-1809). Although counsel have not seen the opinion in that case, they are advised that the Sixth Circuit upheld the power of the district court to cross school district lines, but remanded for additional hearings. Under such circumstances *Bradley* v. *Milliken* would not be ripe for review by this Court, but the action of the Sixth Circuit demonstrates the need for a definitive resolution of the questions presented in the instant case.

5. Under the present circumstances, an affirmance by an equally divided court would represent, not an end to the present case, but the beginning of a new and unavoidably confused round of litigation.

The responsibilities of district courts in cases arising under *Brown* do not end when a desegregation plan acceptable on its face has been adopted and approved on appeal. Rather, *Brown II* contemplates that jurisdiction will be retained to assure that the goal of a unitary school system is rapidly and finally achieved. *Raney* v. *Board of Educa-*

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tion, 391 U.S. 443 (1968). The only plan now in effect in this case is that approved on April 5, 1971 regarding the assignment of students within the City of Richmond. 325 F. Supp. 828. The Court of Appeals appears to have concluded that, as of January, 1972, when the District Court approved the metropolitan area desegregation plan, the plan of April 5, 1971 was still adequate. Over two years have now passed since any hearing on the adequacy and effectiveness of the April 1971 plan.

On remand of the instant case, at least in its present posture, the adequacy and effectiveness of the April 1971 plan must again be reviewed by the District Court. In disapproving the District Court's plan the Fourth Circuit laid heavy emphasis on its conclusion that no substantial evidence had been adduced that white students were fleeing the predominantly black schools of Richmond to the overwhelmingly white schools of Henrico and Chesterfield Counties. The evidence relied on by the Fourth Circuit dealt primarily with the presence of former Richmond students in Henrico and Chesterfield County Schools in the 1970-71 school year, before the April 1971 plan was put into operation. On remand the District Court will have to consider whether developments *since* January, 1972 reveal that the plan of April 1971 is not leading to a unitary system because white parents in Richmond are moving to the all-white school districts or because white parents moving into the Richmond area are choosing to reside in Henrico and Chesterfield Counties to avoid sending their children to integrated schools.

Once the District Court makes such a finding regarding the effectiveness of the April, 1971 plan, it will find itself in the same quandary posed to all other lower courts by a 4-4 affirmance. Although the Fourth Circuit's judgment disapproving the plan of January, 1972, would stand, the reasons given by the Fourth Circuit are not binding as the law of the case. *Compare Biggers* v. *Tennessee,* 409

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S. 188 (1972). The District Court will have no guidance to how the Fourth Circuit's 1972 decision will ultimately reconciled with *Emporia* and *Scotland Neck*. Only this urt will be able to finally resolve any litigation arising m white flight. It is far better to resolve those questions e and now than to force petitioners in a case already years old to begin anew in the District Court.

. Because of the timing of the Fourth Circuit's deci-n, this case was virtually the last argued in the 1972 m. Four weeks after argument the Court apparently ıcluded it could not resolve the even division it then ed, and affirmed the decision below accordingly. The urt may of course have been concerned with the desir-lity of resolving this case in time for the 1973-74 school ır.

Petitioners submit, in view of the difficulties which neces-ily ensue from a 4-4 affirmance in an unusual case such this, that it would be in the best interests of the parties l of the effective implementation of *Brown* for the urt to allow itself additional time to resolve the present oasse. In other cases where the Court was closely di-ed, it has labored for far longer than the 28 days in this e before permitting the litigation to be resolved by an al division. See, *e.g.*, *United States* v. *First National ncorporation*, 41 U.S.L.W. 4358 (1973) (134 days); *we Press* v. *Maryland State Board of Censors*, 401 U.S. (1970) (118 days). The Court has freely directed re-ument on its own motion in recent years,[2] preferring

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[2] The court ordered rehearings in at least eight cases arising he 1970 term. *United States* v. *Brewster* (No. 45) 404 U.S. 51 (1972); *S. & E. Contractors* v. *United States* (No. 88) U.S. 1035 (1972); *Argersinger* v. *Hamlin* (No. 5015) 404 999 (1971); *Kirby* v. *Illinois* (No. 5061) 404 U.S. 1055 '2); *Roe* v. *Wade* (No. 18) 41 U.S.L.W. 4213 (1973), *Doe* v. *on* (No. 40) 41 U.S.L.W. 4233 (1973); *United States* v. *Orito* . 69); *Miller* v. *California* (No. 73).

the wisdom of a decision slowly arrived at to the dispatch of one reached under the pressure of the imminent end of the term.

CONCLUSION

The petition for rehearing should be granted and the case set down for reargument.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that this Petition is presented in good faith and not for delay.

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June 15, 1973

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